IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 1ST JANUARY 2007 / 11TH POUSHA 1928

WP(C).No. 17366 of 2004(P)

I.A.60/03 IN AS.9/2003 of DISTRICT COURT, KOTTAYAM
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PETITIONER:

THRESIA, D/O. AVIRA CHUNDAKKATTU HOUSE,
KIZHAKKETHIL HOUSE, PADINJATTU BAGAM KARA, (DIED)
ATHIRAMPUZHA VILLAGE P.O., KOTTAYAM DISTRICT.

ADDL.2ND PETITIONER IMPLEADED AS PER ORDER DATED 22/8/05 IN IA 12258/05

ANCY, D/O.JOSEPH, W/O.VARGHESE, CHUNDAKKATTU HOUSE, KIZHAKKETHIL HOUSE, PADINJATTU BAGAM KARA, ATHIRAMPUZHA VILLAGE.P.O., KOTTAYAM DISTRICT

BY ADV. SRI.N.SUBRAMANIAM
SRI.M.S.NARAYANAN

RESPONDENTS:
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1. JOSEPH, S/O. KURIAN, KANJIKATTU HOUSE,
VELLOOR KARA VILLAGE P.O.,
VAIKOM TALUK.

2. RAJU, P.M.H. SOUNDS, ETTUMANOOR-686 631,
KOTTAYAM DISTRICT.

BY ADV. SRI.P.M.NATESAN
SRI.P.K.MURALEEDHARAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 01/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX:

EXT.P1: COPY OF PETITION TO CONDONE THE DELAY AND AFFIDAVIT IN SUPPORT THEREOF DT.4.1.03

EXT.P2: COPY OF COUNTER AFFIDAVIT DT.17.3.03

EXT.P3: COPY OF ORDER DT.17.6.03 PASSED BY DISTRICT COURT, KOTTAYAM IN IA 60/03 IN AS 9/03

//True copy//

PA TO JUDGE.

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NO.17366 OF 2004

Dated 1st January 2007

JUDGMENT

Petitioner is plaintiff in O.S.180/2000 on the file of Munsiff court, Ettumanoor and first respondent in A.S.9/03 on the file of District court Kottayam. First respondent is appellant in the appeal and first defendant in the suit. Second respondent is second defendant and second respondent in the appeal. Decree was granted in favour of petitioner on 8/11/2001. First respondent filed A.S.9/03 challenging the decree and judgment with I.A.60/03 an application under Section 5 of Limitation Act to condone the delay of 11 months and 20 days in filing the appeal on 4/1/2003. Reasons shown for condoning the delay was that he entrusted his counsel to file an appeal and the counsel misplaced the records and did not file appeal and therefore delay occurred and it was neither wilful nor due to any negligence and is to be condoned. Petitioner filed Ext.P2 objection disputing the reasons and contending that first respondent has

not even filed the affidavit of the counsel to show that certified copy was entrusted with the counsel with instructions to file an appeal and appeal could not be filed as the records were misplaced and therefore delay cannot be condoned. Learned District Judge under Ext.P3 order condoned the delay of payment of cost of Rs.350/- which is challenged in this petition filed under Article 227 of Constitution of India.

2. Learned counsel appearing for petitioner and first respondent were heard. Arguments of learned counsel appearing for petitioner was that even though decree was passed on 8/11/2001 and in the application filed by petitioner, first respondent appeared before the executing court on 28/8/2002, appeal was filed only on 4/1/2003 and in spite of objections raised by the petitioner that affidavit of the counsel in support of the allegations raised in the application was not filed and no evidence was adduced and in such circumstances the impugned order is to be set aside. Learned counsel relied on the decision of Apex court in **Ramachandran v. State of Kerala (1997 (2) KLT 647 (SC)**) and argued that without sufficient reason learned District Judge should not have condoned the delay. Learned counsel appearing for respondent relied on the decision of the Apex court

in **N.Balakrishnan v. M.Krishnankutty (AIR 1998 SC 3222**) and argued that when delay was caused due to the failure of the advocate, it is sufficient reason to condone the delay and learned District Judge has allowed the application only on terms and in such circumstances there is no reason to interfere with the impugned order.

3. Decree was passed on 8/11/2003. Appeal was filed along with application to condone the delay only on 4/1/2003. What was contended by first respondent was that he had entrusted his counsel to file an appeal but the counsel misplaced the records and did not file appeal in time and delay was caused due to misplacing of records by the counsel and not due to his negligence or latches and therefore delay is to be condoned. True, petitioner did not adduce any evidence and even the affidavit of the counsel was not filed. But the question is whether in exercise of the extra ordinary jurisdiction of this court under Article 227 of Constitution of India, the discretion exercised by learned District Judge in condoning the delay and that too on terms, is to be interfered.

4. Apex court in Balakrishnan's case (supra) dealt with criterion on condoning the delay and when the discretion exercised by the court could be interfered. It is axiomatic that condonation of delay is a matter of

discretion of the court. Rules of limitation are meant to see that parties do not resort to dilatory tactics, but seek the remedy promptly. A court is not expected to refuse to condone delay for the reason that there is a presumption that delay was caused deliberately or due to negligence. Sufficient cause provided under Section 5 of Limitation Act is to be liberally construed so as to advance substantial justice.

5. The appeal was filed with the certified copy obtained by first respondent earlier. He has explained the delay caused due to the misplacing of records by the counsel. Fact that appeal was filed with the certified copy obtained earlier strengthen the case of first respondent that delay was caused due to misplacing of the records by his counsel. Though petitioner did not file an affidavit of the counsel, for the failure to produce the affidavit alone, it cannot be said that delay was not caused for the reason stated by the petitioner. When respondent obtained a certified copy for filing an appeal, when he did not and would not derive any advantage by delaying the filing of appeal it cannot be imagined that the delay was wilful. In the circumstances of the case, the delay could have been only for the reasons claimed by him. In any event when the learned Additional District Judge has condoned the

delay exercising the discretion, I do not find any reason to interfere with that discreting power exercised by the learned District Judge to advance substantial justice.

Writ petition is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.